International Brotherhood of Firemen and Oilers, Local No. 320 AFL–CIO (Philip Morris, U.S.A.) *and* Archie D. Sadler, Jr. Case 9–CB–9197

February 26, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On a charge filed by Archie D. Sadler, Jr. on July 27, 1995, as amended on August 8, 1995, the General Counsel of the National Labor Relations Board by the Regional Director for Region 9 issued a complaint and notice of hearing on October 20, 1995, against International Brotherhood of Firemen and Oilers, Local No. 320, AFL–CIO, the Respondent. The complaint alleged that the Respondent violated Section 8(b)(1)(A) by failing to fairly represent certain bargaining unit employees when it negotiated changes in the seniority provisions of a collective-bargaining agreement. On November 1, 1995, as amended on that same day, the Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 18, 1996, the Respondent, Charging Party Sadler Jr., and the General Counsel filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties agreed that the charges, complaint, the Respondent's answer and amended answer and the stipulation of facts, including exhibits, constitute the entire record in the case and that no oral testimony is necessary nor desired by any of the parties. The parties further stipulated that they waived a hearing, the taking of testimony or the submission of evidence before an administrative law judge, and the issuance of a decision by an administrative law judge.

On August 13, 1996, the Board issued an order granting the motion, approving the stipulation of facts, and transferring the proceeding to the Board. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, Philip Morris U.S.A., is engaged in the manufacture of tobacco products at a facility in Louisville, Kentucky. During the 12-month period preceding the issuance of the complaint, the Employer purchased and received at its Louisville, Kentucky facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Respondent, International Brotherhood of Firemen and Oilers, Local No. 320, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

The Respondent represents a bargaining unit consisting of 10 oilers and 4 firemen who are employed in the operation of the Employer's power plant and in the lubrication of its machinery. The Employer also employs production employees at the same facility who are represented by another labor organization. Over the years, senior production employees have bid into vacant entry level oiler positions in the bargaining unit. These former production employees generally had at least 25 years of plant (employer) seniority at the time of their successful entry into bargaining unit positions. They began to accumulate unit or craft seniority from the date of their transfer into the oilers/firemen unit represented by the Respondent.

Some time prior to November 1994, as negotiations approached for a successor bargaining agreement to the parties' 1992–1995 agreement, oilers who were formerly employed as production employees requested that the Respondent seek to change the application of seniority from craft entry date to plant entry date. The 1992–1995 contract, as well as previous contracts, provided that seniority preference was based on craft seniority as opposed to plant seniority. Seniority is critical in determining layoffs, curtailment days (days on which there are not at least 8 hours of work available to each employee), shift preference, bumping rights, and vacation scheduling and polling (the order in which the Employer approaches employees to schedule vacation).

During negotiations for the current collective-bargaining agreement effective March 15, 1995, through March 14, 1998,[1] the Respondent proposed and successfully negotiated a change from craft seniority to plant seniority, but only as applied to shift preference and vacation scheduling/polling. This had the effect of benefiting six oilers who were employed previously in the plant as production workers at the expense of four oilers who had less overall plant seniority, but had accumulated all their seniority while employed in the bargaining unit and therefore had more craft seniority.[2] The Respondent proposed and negotiated the change in these seniority provisions solely at the request of the

[1] The Respondent's bargaining committee consisted of its business agent, a fireman, and two oilers originally employed as production workers.

[2] The change applied only to oilers and not to the firemen classification.

oilers who were previously employed as production workers and for no other reason. The four oilers who had accumulated all their plant seniority while employed in the unit as oilers objected to the change in seniority. The contract was submitted for ratification and approved by a vote of 13 to 4. The four employees who were adversely affected attempted to appeal the Respondent's actions to the International Union but were unsuccessful.

B. *Issue*

The issue is whether the Respondent violated Section 8(b)(1)(A) of the Act when it negotiated a change in the application of seniority as to shift preferences and vacation scheduling/polling at the request of the oilers who were employed previously as production workers.

C. *Contentions of the Parties*

The General Counsel contends that the Respondent breached its duty of fair representation toward the four unit members originally hired by the Employer as oilers. The General Counsel points out that the change from craft seniority to plant seniority benefited the numerically larger group composed of employees originally employed as production workers at the expense of the former group. The General Counsel argues that the change negotiated in the 1995 bargaining agreement substantially impaired the seniority rights of these four members in comparison to the seniority provisions of the predecessor agreements. The General Counsel contends that the change was not justified by objective considerations and, therefore, violated Section 8(b)(1)(A).

The Respondent contends that it did not engage in arbitrary or bad-faith conduct in breach of its duty of fair representation but instead reached a compromise which spread the benefits of seniority more equally between the former production workers and the original oilers. The Respondent argues that it struck an astute compromise between legitimate competing interests by proposing the modification of less important seniority rights, such as shift and vacation bidding, while preserving to the minority group the more critical seniority rights providing layoff and bumping protection.

D. *Discussion*

It is well settled that a union which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. *Vaca v. Sipes*, 386 U.S. 171 (1967). And so long as it exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties. *Ford Motor Co. v. Huffmann*, 345 U.S. 330 (1953); *Air Line Pilots v. O'Neil*, 499 U.S. 65 (1991).

The General Counsel would have us conclude that the Respondent exceeded the wide range of reasonableness accorded to it under the duty of fair representation when it negotiated a revised application of seniority terms solely because it acted on the basis of a request from the oilers previously employed as production workers for a change from craft entry date to plant entry date. For the reasons below, we find no merit in the General Counsel's contention.

In *Ford Motor Co. v. Huffman*, supra at 338, the Supreme Court stated as follows:

> Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

In the present case, the Respondent was confronted with differences between the interests of two groups or classes of unit employees regarding the application of seniority. The "original oilers" group (those hired by the Employer as oilers who never previously had worked as production workers) historically had benefited from a seniority formula tied to their original hire as oilers, i.e., their craft entry date. On the other hand, the group composed of oilers who previously had been employed in the plant as production workers historically had not benefited from their overall plant seniority when they entered the oilers classification. This group desired the application of seniority to be based on plant entry date.

When the latter group requested that the Respondent seek to change seniority from craft entry date to plant entry date, the Respondent negotiated a compromise solution. The 1995–1998 bargaining agreement does the following: plant entry date governs as to shift and vacation preferences and craft entry date governs as to layoffs, bumping, and curtailment days. This solution, on its face, is a rational approach when one considers that the Respondent was faced with a request from one group of unit employees whose interests were not wholly compatible with the interests of another group of unit employees. Understandably, the original oilers, including the Charging Party, were not satisfied with the deal struck by the Respondent, presumably because they no longer enjoyed a dominant seniority advantage as to each and every condition of employment in which seniority was applicable. Perhaps this dissatisfaction was inevitable, but as the *Huffman* Court ruled over 40 years ago, the complete satisfaction of all represented employees is hardly to be expected when differences arise between classes of employees.

The General Counsel contends, however, that the predecessor agreements "dictated the shape of the seniority ladder" and essentially "foreordained" the issue of seniority. In our view, the General Counsel's premise is erroneous. At the expiration of a collective-bargaining agreement, as here, a union is free to negotiate a change in the seniority system as long as it complies with its duty to represent fairly, impartially, and in good faith all of the employees in the unit, even if some employees will be affected adversely by the change. See *Glass Bottle Blowers Assn. Local 149 (Anchor Hocking Corp.)*, 255 NLRB 715 (1981).

The record here reveals no evidence of bad faith or invidious motivation. Compare *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974 (1986), enfd. 825 F.2d 608 (1st Cir. 1987) (union unlawfully negotiated seniority preference based on longevity of union membership and union representation). The stipulation of facts in this case simply states that the Respondent proposed and negotiated the change in seniority solely at the request of the oilers who were previously employed as production workers and "for no other reason."[3] Surely a union does not breach its duty of fair representation simply because it acts pursuant to a request from a group of represented employees and thereafter negotiates contract provisions beneficial to that group.

As the Supreme Court stated in *Humphrey v. Moore*, 375 U.S. 335, 349 (1964):

> [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.

Indeed, in the absence of bad-faith or hostile motive, it would be anomalous to hold that a union breaches its duty of fair representation because it takes into account the interests of a group of represented employees (even if they are a numerical majority) and then partially satisfies that request in achieving a collective-bargaining agreement. After all, a labor organization can be expected to be responsive to its membership. That is what the Respondent did here. Although it is true that the altered seniority provisions partially benefited one group to the detriment of another group, when viewed in comparison to the historical seniority application which benefited one group exclusively, we find that the Respondent's compromise solution was well within the wide range of reasonableness accorded a union in the circumstances that the Respondent confronted here.[4]

Finally, although the evidence in this case shows that the Respondent achieved a compromise solution, we emphasize that the wide range of reasonableness accorded a union in its negotiating capacity does not *require* a union to achieve a "Solomonic" solution or to precisely split the difference between legitimate competing demands. So long as the union's conduct when negotiating a bargaining agreement is not wholly irrational or arbitrary, or in bad faith or based on impermissible considerations, there is no breach of its duty of fair representation. As the Supreme Court found in *Air Line Pilots v. O'Neil*, 499 U.S. at 78:

> Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. . . . For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S., at 338, that it is wholly "irrational" or "arbitrary." [Citations omitted.]

Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) as alleged.

[3] The complaint contains the additional assertion that the Respondent did so "to gain the favor and support" of the former production workers. The stipulation of facts does not contain this phrase, and the record contains no other evidence to support the complaint in this respect. Accordingly, we do not address the significance of this assertion.

[4] Because, as explained above, the Respondent took into account legitimate interests of both groups of oilers in crafting its compromise on seniority, and therefore did not act arbitrarily or irrationally, our decision here is not in conflict with *Barton Brands, Ltd.*, 228 NLRB 889 (1977), on remand from 529 F.2d 793 (7th Cir. 1976), deny enf. to 213 NLRB 640 (1974) (finding violation of Sec. 8(b)(1)(A) and (2) where union failed to demonstrate an "objective justification" for its "endtailing" of one group of employees for purposes of layoff and recall from layoff).

Chairman Gould is of the view that the Board's holding today is not only correct as a matter of duty of fair representation law but that also competing positions on seniority are frequently and appropriately resolved on the basis of political considerations. Such considerations are "legitimate" and to the extent that *Barton Brands* states otherwise, his view is that that holding is in error. Chairman Gould would adhere to the view set forth by the administrative law judge in *Barton Brands, Ltd.*, 213 NLRB 640, 649–650 (1974). Cf. W. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L.J. 1 (1967).

CONCLUSIONS OF LAW

1. Phillip Morris, U.S.A. is an employer engaged in commence within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Firemen and Oilers, Local No 320, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(b)(1)(A) of the Act by negotiating changes in the seniority provisions of a collective-bargaining agreement effective March 15, 1995, through March 14, 1998.

ORDER

The complaint is dismissed.